Proposed framework and key elements of a third UNCLOS Implementing Agreement

WWF submission to the BBNJ PrepCom Chair and to DOALOS for PrepCom3

5 December 2016

Introduction

This paper is part of a WWF rolling submission[1] to the third session of the BBNJ Preparatory Committee (PrepCom3) established by General Assembly resolution 69/292 on the development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

It addresses and makes recommendations regarding:

(1) substantive issues of cross-cutting nature, including governing principles, use of terms, and scope;

(2) the objective of the Implementing Agreement (IA);

(3) the institutional framework;

(4) the process for establishing marine protected areas (MPA);

(5) processes related to environmental impact assessments and strategic environmental assessments (EIA/SEA);

(6) multilateral benefit sharing from marine genetic resources (MGR) in ABNJ; and

(7) capacity building and technology transfer.

[1] See previous WWF submissions to PrepCom1 on Enhanced Cooperation and Dispute Settlement and on Marine Genetic Resources (both available at http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com1_2016.pdf), and for PrepCom2 on Strategic Environmental Assessments and Environmental Impact Assessments (available at http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com2_2016.pdf)

It is important to note that the institutional framework suggested here is reflecting the need for a comprehensive global regime for the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction (BBNJ), which fully engages and does not undermine existing instruments and competent bodies, in accordance with UNGA Resolution 69/292. To achieve this comprehensive global regime capable of securing the widest possible acceptance pursuant to the Resolution, a robust institutional framework is suggested, with specific key functions (see section 3).

As this is a rolling paper, WWF will continue to further develop and share its views and recommendations on the issues discussed here, and on equally important and complementary issues regarding state responsibility and liability as well as dispute settlement under the BBNJ Implementing Agreement prior to PrepCom3.

1. Substantive issues of cross-cutting nature

1.1. Governing principles

The IA should incorporate a number of principles of international law and create new ones that are relevant to its implementation. Several principles should guide the interpretation and implementation of the IA, of which WWF wishes to highlight the following ones: [2]

a) **Ecosystem Approach**: The IA should integrate the ecosystem approach among its governing principles. In this regard, WWF recommends that an Annex to the IA (forming an integral part of the Agreement) be adopted guiding the implementation of ecosystem-based management in the same fashion as Annex II of the United Nations Fish Stocks Agreement (UNFSA) guides the operationalization of the precautionary approach to fisheries.

   The IA should also explicitly call for the implementation of Ecosystem-Based Management (EBM) as a means to ensure governance coherence.[3] In this connection, it should be made clear in the Agreement and/or the Annex that such operationalization requires the management of the entire ecosystem (at appropriate biogeographical scales) by taking into account all human activities and other pressures/stressors that directly or indirectly affect the ecosystem in question for the long-term conservation and sustainable use of marine biodiversity. In order to do this, EBM should be based on biogeographical units that should be defined by the IA Subsidiary Body for Scientific and Technical Advice (see section 3 (b) below).

[2] See also the document prepared by the High Seas Alliance on Ten Governance Principles for an International Legally Binding Instrument on Marine Biodiversity in Areas Beyond National Jurisdiction, online: http://www.highseasalliance.org/sites/highseasalliance.org/files/HSA_10%20principles_English_web.pdf

[3] Reflecting latest trends in law-making. E.g. CBD, Decision VII/11; The Future We Want, para. 158; SDG 14.c; UNGA Resolution 70/235, para. 209 (which recalls UNGA Resolution 61/222, para. 119); CBD Strategic Plan for Biodiversity 2011-2020, including Aichi Biodiversity Targets (CBD Decision X/2); Aichi Biodiversity Target 6; Fish Stocks Agreement, Art. 5; Amendment to the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (2007), Art. II; Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, Art. 2; among several other instruments.

b) **Precautionary Principle**:[4] The IA should incorporate the precautionary principle among its principles and tailor it to the specific context and objective of the Agreement. For instance, it could state that "Where there are threats of significant adverse impacts or damage,[5] lack of full scientific certainty shall not be used as a reason for postponing measures to prevent or mitigate such a threat or environmental degradation".

Contracting parties shall apply the precautionary principle by also taking measures to prevent direct or indirect harm and threats to marine biodiversity, ecosystems and human health, even in the absence of a causal relationship (adapted from Art. 2 of the OSPAR Convention and Principles 2 (principle of prevention) 15 (precautionary principle), and 17 (environmental impact assessment) of the Rio Declaration).

c) **Polluter & User Pays Principle**: The polluter pays principle as per Principle 16 of the Rio Declaration should be incorporated into the Agreement with a view to internalise the costs of environmental externalities, and to ensure accountability and liability mechanisms for non-compliance with the Agreement. The user pays principle, which has been integrated successfully into watershed management contexts around the globe, should also be included in the IA through the introduction of a user fee and the establishment of a corresponding trust fund. Natural capital and ecosystem services-related information could be helpful when developing guidance for the operationalization of the user pays principle.

d) **Conservation of Biodiversity as a Common Concern of Humankind**: The IA should incorporate among its principles the common concern of humankind. Conservation of biodiversity (within and beyond national jurisdiction) is already considered a common concern of humankind as per the Convention on Biological Diversity (CBD). The IA should be consistent with the CBD to avoid further fragmentation of international law by incorporating this principle, which encompasses the notion of intergenerational equity, international solidarity, shared decision-making, accountability, as well as sharing of benefits and burdens through financial cooperation.[6]

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[4] The Precautionary Principle, as per Principle 15 of the Rio Declaration, has already been incorporated in a number of international and regional treaties related to the marine environment, biodiversity and ecosystems (not to mention other multilateral environmental agreements), including the 1992 Convention on Biological Diversity, the 1995 Fish Stocks Agreement, the 1996 Protocol to the London Dumping Convention, the 1992 OSPAR Convention, the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, the 2003 Framework Convention for the Protection of the Marine Environment of the Caspian Sea, among others. Therefore, the IA, as a comprehensive agreement that aims to bring governance coherence to BBNJ (as per UNGA Resolution 69/292, 5th preambular paragraph) should also incorporate such principle among its governing principles.

[5] The Fish Stocks Agreement also incorporates the notion of "prevention of damage to the stocks in question" (Art. 31 (2)) with regards to the possibility of Courts prescribing provisional measures to prevent such damage.

[6] See C Bowling, E Pierson, S Ratte: "The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas" (2016) (submission by IUCN to DOALOS for PrepCom2) online: http://www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf

Issues of common concern are also those that "inevitably transcend the boundaries of a single state and require collective action in response; no single state can resolve the problems they pose or receive all the benefits they provide."[7] Biodiversity of areas beyond national jurisdiction matches all these characteristics and the practical implementation of such principle should be done through international cooperation (see (e) infra).

e) **International Cooperation**: The duty to cooperate for the protection of the environment[8] has been widely recognised as a principle of general international law.[9] In the *MOX Plant Case*, ITLOS highlighted that "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention on the Law of the Sea (UNCLOS) and general international law."[10] UNCLOS also applies this fundamental principle to a number of its other provisions regarding fisheries, marine scientific research, protection and preservation of the marine environment, transfer of marine technology, among others.

In elaborating a coherent governance regime and institutional architecture of the BBNJ Implementing Agreement to give effect to the cooperation requirements of the Convention will require an integrative and evolutionary approach similar to the one envisioned under UNCLOS. In this respect, UNCLOS[11] incorporates by reference generally agreed standards adopted by competent organisations and bodies at the global, regional and sub-regional levels that are relevant to areas beyond national jurisdiction (ABNJ), [12] by mandating that states, inter alia:

(a) take into account any generally recommended international minimum standards in the management of living marine resources;[13]

(b) adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources taking into account internationally agreed rules, standards and recommended practices and procedures;[14] In this connection, states are also required to enforce their laws and regulations and to take necessary measures to implement applicable international rules and standards;[15]

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[7] D Shelton: "Common Concern of Humanity" (2009) 39 (2) Environmental Policy and Law 83 – 86, at 84.

[8] Not only with respect to the prevention of marine pollution but also with respect to conservation and sustainable utilization of stocks (see note 8 infra).

[9] See A Boyle: "The Environmental Jurisprudence of the ITLOS" (2007) 22 (3) The International Journal of Marine and Coastal Law 369-381. See also ILC's draft Articles on transboundary harm; Rio Declaration on Environment and Development, Principles 7, 9, 12, 13, 14 18, 19, 27; ICJ, *Pulp Mills on the River Uruguay (Argentina v Uruguay),* Judgment (2010) ICJ Rep 14; ITLOS, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Case no. 21 (2015), paras. 213, 240.

[10] *The MOX Plant Case (Ireland v United Kingdom),* ITLOS 2001, para. 82.

[11] As well as UNFSA with respect to the conservation and sustainable management of highly migratory and straddling fish stocks. See Articles 5 (b), 10 (c), 18 (e), 30 (5).

[12] Similar requirements to areas within national jurisdiction are included in respective UNCLOS' provisions.

[13] UNCLOS, Art. 119 (1) (a).

[14] UNCLOS, Art. 207 (1).

[15] UNCLOS, Art. 213.

(c) [coastal states shall] adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities under their jurisdiction; and that such laws, regulations and measures shall be no less effective than international rules, standards and recommended practices and procedures;[16] In this connection, states shall enforce such laws and regulations and take necessary measures to implement applicable international standards;[17]

(d) adopt and enforce laws and regulations to prevent, reduce and control pollution of the marine environment that are no less effective than the global rules and standards developed by the International Maritime Organization (IMO);[18]

(e) adopt and enforce laws and regulations for the prevention, reduction and control of pollution from vessels flying their flag or of their registry; and that such laws and regulations shall at least have the same effect of that of generally accepted international rules and standards established through the IMO or general diplomatic conference;[19]

(f) adopt and enforce laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation.[20]

Furthermore, according to UNCLOS:

> "*States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features*."[21]

It is important to note the explicit recognition under the Convention of the need to take into account regional features. This is because, among other reasons, marine conservation and management measures are best delivered at a regional scale while benefiting from global guidance and general standards. Moreover, marine ecosystems are often transboundary. A better understanding of ecosystem integrity and function at a (bio)regional level is a fundamental first step in implementing ecosystem-based management for the conservation and sustainable use of BBNJ.

States Parties to the CBD are also required to cooperate, directly or through competent organisations, with respect to areas beyond national jurisdiction and on other matters of

[16] UNCLOS, Art. 208 (1) and (3). These are important provisions to consider in the context of ABNJ in the context of transboundary pollution risks.

[17] UNCLOS, Art. 214.

[18] UNCLOS, Art. 210 (1), (4) and (6).

[19] UNCLOS, Art. 211 (1).

[20] UNCLOS, Art. 212 (1).

[21] UNCLOS, Art. 197.

mutual interest, for the conservation and sustainable use of biological diversity[22]. In addition to the CBD, the integration and incorporation by reference of standards developed by related multilateral environmental agreements (MEAs) should not be overlooked. The IA presents a unique opportunity to mainstream important requirements and global minimum standards established under the Convention on the Conservation of Migratory Species of Wild Animals (CMS), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and several others in regards to BBNJ.

In this connection, WWF recommends that the BBNJ Implementing Agreement facilitates the implementation of rights, obligations and generally agreed standards and measures adopted under relevant policy and legal instruments by competent sectoral and regional organizations and bodies[23] to ensure legal coherence and less fragmentation of international law. This enhanced cooperation for the development and implementation of generally agreed rules and standards could be operationalized at the regional level through the proposed Regional Committees (see section 3 (b) (v) below).

f) **Transparency and Public Participation:** transparency gives legitimacy to decision-making and law-making processes. In fact, transparency and public participation together with the principles referred to above and other elements of the BBNJ Implementing Agreement (e.g. EIAs) constitute procedural elements of sustainable development and are relevant to global and transboundary environmental law.[24] As observed by Birnie et al, "[c]ooperation between states, environmental impact assessment, public participation in environmental decision-making, and access to information perform the function of legitimizing decisions and, if properly employed, may also improve their quality."[25]

Principle 10 of the Rio Declaration on public participation (i.e., access to information, participation in decision-making at all levels and access to justice) has influenced the incorporation of similar provisions in subsequent global environmental agreements.[26] The law-making impact of Principle 10 has also been felt at regional,[27] national and local levels. Sustainable Development Goal (SDG) targets 16.6, 16.7, and 16.10 also reflect the wide support for such principles under general international law and international environmental law and human rights law.

Therefore, the IA should incorporate the principles of transparency and public participation, including information sharing with the general public, experts, competent organisations, scientists, civil society, industry and indigenous peoples and local communities that could be

[22] CBD, Art. 5.

[23] This is in line with UNGA Resolution 69/292, para. 3.

[24] See P Birnie, A Boyle, C Redgwell: *International Law & the Environment*, 3rd Ed, (OUP, 2009).

[25] Ibid at 123.

[26] See J Ebbesson, "Principle 10: Public Participation" in JE Vinuales (Ed), *The Rio Declaration on Environment and Development, A Commentary* (OUP 2015)

[27] Most notably the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

affected by activities under the jurisdiction or control of contracting parties or by decisions taken under the agreement. Consultation processes on ecosystem-based management plans, EIAs, SEAs, and MPAs should be required, and Conference of the Parties (COP) decisions should be openly made and justified to ensure accountability. Information sharing through a clearinghouse mechanism and integrated database systems should be developed.

1.2. Suggested use of terms and definitions

a) **Area-based management tools (ABMTs):** WWF proposes the following use of the term ABMTs: "ABMTs include both sectoral and cross-sectoral measures that contribute to conservation and sustainable use of marine biodiversity. Examples of cross-sectoral ABMTs include marine spatial planning and marine protected areas. Examples of sectoral ABMTs include fisheries closures designated by Regional Fisheries Management Organisations (RFMOs), Particularly Sensitive Sea Areas (PSSAs) designated by the International Maritime Organization (IMO), or Areas of Particular Environmental Interest (APEIs/reference zones) designated by the International Seabed Authority (ISA)."

b) **Marine protected area (MPA):** WWF suggests that existing definitions from relevant treaties (i.e., CBD) be reflected in the Implementing Agreement for governance coherence, and adjusted to BBNJ, as needed. The following proposed MPA definition therefore uses the CBD definition as a basis. Marine protected area means: "A defined area of the marine environment, including its associated flora, fauna, historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine biodiversity enjoys a higher level of protection than its surroundings". Besides the definition, the IUCN categorization of different types of (marine) protected areas should be recognized to guide the designation process and the development of appropriate management plans. As guidance may change over time in light of new scientific information, it is suggested that such guidance be included in an Annex to the Implementing Agreement that enables eventual amendments to be incorporated by COP decisions.

c) **Marine spatial planning (MSP):** MSP is a cross-sectoral area-based management tool that provides a framework for the orderly and sustainable use of the oceans as envisioned by UNCLOS with a view to balance demands for development with the need to protect the marine environment. Sectoral area-based management tools (e.g. fisheries closures, PSSAs, APEIs), other cross-sectoral ABMTs (e.g. MPAs), SEAs and EIAs are an integral part of this overarching planning approach. MSP approaches should be ecosystem-based, adaptive and include all relevant stakeholders in the area under consideration.

d) **Ecosystem-based management (EBM):** WWF suggests the following definition of EBM: "Ecosystem-based management (EBM) means an integrated approach to management that considers the entire ecosystem, including all stakeholders and their activities, and resulting stressors and pressures with direct or indirect effects on the ecosystem under consideration. The goal of EBM is to maintain or rebuild an ecosystem to a healthy, productive and resilient

condition, through, inter alia, the development and implementation of cross-sectoral ecosystem-level management plans".

1.3. Suggested scope of application

The scope of application of the Implementing Agreement should reflect and build upon the responsibility of states under international law to not cause damage to ABNJ or to other states, by "ensur[ing] that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".[28]

In light of these existing obligations under UNCLOS and general international law, WWF suggests that the provisions of this Agreement apply to:

(i) marine biodiversity of areas beyond national jurisdiction;
(ii) activities carried out under the jurisdiction or control of a contracting party in areas beyond national jurisdiction; and to
(iii) activities with the potential to have significant effects on or to cause damage to marine biodiversity or ecosystems in areas beyond national jurisdiction regardless of where these activities occur.

2. Suggested objective of the Implementing Agreement

WWF considers the Implementing Agreement as an opportunity to operationalize not only relevant provisions of UNCLOS and other related international agreements but also relevant policy instruments in close connection with UNCLOS, such as those regarding ecosystem-based management,[29] and suggests the objective of the new Implementing Agreement be:

"*The objective of this Agreement to be pursued in accordance with its provisions is to ensure the long-term conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction through the effective operationalization of ecosystem-based integrated oceans management and through the effective implementation of the relevant provisions of the Convention and other relevant instruments.*"

[28] Stockholm Declaration, Principle 21; CBD, Art. 3; and consistent with UNCLOS, Part XII

[29] E.g. Agenda 21, Chapter; WSSD, Plan of Implementation; CBD, Decision VII/11; The Future We Want, para. 158; SDG 14.c; UNGA Resolution 70/235, para. 209 (which recalls UNGA Resolution 61/222, para. 119).

3. Institutional framework

It has been widely recognised[30] that effective multilateral environmental agreements (MEAs) require appropriate institutional frameworks which are able to support their implementation and the progressive evolution of the respective treaty in light of emerging issues. Such institutional framework normally comprises a Conference of the Parties[31] and respective different types of subsidiary bodies. WWF, therefore, recommends the following institutional architecture, considering best practices:[32]

a) Conference of the Parties with Secretariat

WWF suggests that the new IA establishes a Conference of the Parties with predetermined functions and mandate, which should meet regularly with the purpose of, inter alia:

(i) Overseeing/supervising the implementation of the IA, including the operationalisation of ecosystem-based integrated oceans management in ABNJ, and compliance mechanisms;

(ii) Facilitating cooperation and coordination among different stakeholders, states and competent organisations, including through the possible establishment of regional committees[33] as subsidiary bodies;

(iii) Developing new substantive obligations and requirements for parties related to the implementation of and compliance with the IA;

(iv) Considering any additional action or function that may be required for the achievement of the objective of the IA, including residual powers to regulate, manage and guide unregulated activities (i.e. in cases where a competent regulatory body does not exist (e.g. cable laying) as well as emerging activities);

(v) Establishing additional subsidiary bodies and providing guidance to these bodies, as considered necessary.

[30] See R Churchill, G Ulfstein: "Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international law." (2000) *American Journal of International Law*: 623-659.

[31] The decision-making for COP decisions or resolutions should encompass the notion that all efforts be made to reach consensus. However, if such efforts are exhausted, majority voting (simple or qualified) should be allowed for. In this regard, it is noteworthy that the International Civil Aviation Organization (ICAO) and the International Atomic Energy Agency (IAEA) can take specific decisions by majority vote, which is binding upon all parties without the possibility of objection.

[32] Member States may consider adapting the form of this suggested architecture, but WWF recommends retaining the respective functions with a view to enable the accomplishment of the objectives of the new Implementing Agreement.

[33] See section (b) below.

b) Subsidiary bodies

Subsidiary bodies have the important role of supporting the COP and contracting parties implement MEAs in an efficient manner. WWF suggests an institutional architecture that is able to effectively deal with the complexity of BBNJ governance in light of the broad range and overlapping nature of both existing instruments and competent bodies.

As some delegates have expressed concern over establishing new institutions, WWF suggests that the functions of the subsidiary bodies we propose are critical to the achievement of the objective of the IA and the coherent implementation of UNCLOS in ABNJ, but that there are two ways of ensuring these functions be retained and exercised: either by setting out the bodies/institutional arrangements in the IA, or by giving the responsibility to the COP to exercise these functions including through establishing such bodies as it sees fit.

In this light, WWF suggests the following COP subsidiary bodies and respective functions:

(i) Subsidiary Body for Scientific and Technical Advice (SBSTA)

The proposed SBSTA would be comprised of delegations of qualified experts[34] from parties and observers, to provide advice and guide COP in its deliberations.

This body could also establish ad hoc working groups and work with independent scientists and experts to deliver their mandate. The SBSTA would also collate and build upon relevant existing scientific information from relevant organisations (e.g. CBD, FAO, UNEP, UNESCO, ISA, IMO) in exercising its functions and mandate, including providing scientific and technical advice on establishing ecologically representative MPA networks, biogeographical classification schemes or assessing cumulative impacts of human activities in ABNJ.

The SBSTA would also support the Regional Committees (see (iv) below), as needed, with technical and scientific input as required. It is also recommended that this SBSTA be given a broad mandate to also initiate its own work plans in pursuit of its own objectives and purposes, especially in developing operational standards, criteria and guidance/guidelines to give effect to general principles, purposes, aims and objectives set out in the IA for adoption by the COP, as well as providing scientific and technical assistance in operationalising ecosystem-based integrated oceans management at appropriate biogeographic scales.

For the purpose of information sharing and dissemination, a clearing-house mechanism or online repository should be maintained with such information (biological/ecological/oceanographic), as well as pressures, stressors, activities and uses of the marine space, which would be essential for the assessment of cumulative impacts and the development of SEAs, EIAs and MPA network planning integrated into ecosystem-based integrated ocean management plans.

[34] In the same fashion as the Bonn Convention (Art. VIII (2)).

(ii) SEA/EIA Administrative Oversight Committee

This body would be responsible for ensuring that the particular parts of EIA and SEA (including bioregional SEA)[35] processes are properly conducted by the appropriate entities (which may be decided pursuant to standing arrangements or on a case by case basis, generally with EIAs being done by capable individual operators, and SEAs being done by those bodies with the appropriate level of collective responsibility, either sectorally or cross-sectorally, depending on the scope or location of the particular SEA).

This body would establish guidelines for and ensure appropriate assessment of EIAs, especially in establishing professional technical teams to guide and assess EIAs and guide/conduct SEAs. This body would work in close cooperation with the SBSTA and any Regional Committees and competent organisations and provide advice to COP on EIAs and SEAs. Its oversight will be particularly important in regions that have not yet established a Regional Committee (see section (v) below).

(iii) Subsidiary Body on Finance, Capacity Building and Technology Transfer[36]

This body would be responsible for facilitating resource mobilisation to facilitate implementation of the IA and for providing assistance to parties, especially developing countries, and among those, particularly least developed countries and SIDS, in implementing the IA.

(iv) Subsidiary Body on Compliance and Implementation[37]

Parties should be required to report on the implementation of the IA and any COP decisions, based upon pre-determined reporting criteria. The proposed Subsidiary Body on Compliance and Implementation would examine such reports prior to meetings of the COP and recommend to the COP steps that should be taken to enhance such implementation (including incentives as well as possible sanctions[38] in accordance with the respective non-compliance provisions and mechanisms established by the IA). Such body could also be tasked to undertake non-compliance procedures. Non-compliance complaints by non-state actors could also also be received by this body for further analysis and brought to the attention of the COP for appropriate follow up, as described above.

[35] See WWF (2016) submission to PrepCom 2 on EIAs/SEAs.

[36] An example of such a body is found in the Montreal Protocol.

[37] An example of such a body is found in the Montreal Protocol, UNFCCC, CBD, among others.

[38] As called for in the 1992 Rio Declaration on Environment and Development:

"… States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction." (Principle 13)

(v) Regional Committees

Global obligations are best delivered at regional scale.[39] This is the scale at which ecological realities and coalitions of conservation and sustainable use interests best align. Much as the UNFSA provides for the establishment of regional fisheries management organisations (RFMOs) by states with an interest in the commercial exploitation of particular kinds of fish stocks,[40] the IA would provide for parties with an interest in the conservation and sustainable use of biodiversity in a particular region to voluntarily[41] establish regional arrangements they deem appropriate for that region to best facilitate implementation of relevant obligations and commitments, including Regional Committees. Membership would be open to all parties to the IA and non-parties to the IA would be welcome as observers. Establishment of such committees would be by COP acceptance of a proposal by a group of proponent member states with the relevant interest. As committees of the IA, they would be empowered to establish subsidiary arrangements as they see fit to fulfill their respective mandates.

The principal mandate delegated to any such Regional Committees by the COP, in accordance with the IA, would be to facilitate the IA implementation by overseeing and facilitating enhanced cooperation between states (in respect of all their relevant sovereign competencies) and existing bodies and arrangements, including sectoral bodies with competency for controlling activities in ABNJ (i.e. ISA, IMO and relevant RFMOs) in a manner and to an extent that does not undermine them, but ensures a concerted and comprehensive legal regime, consistent with UNGA Resolution 69/292. Additionally, Regional Committees could be delegated to exercise residual powers to fill any identified governance and regulatory gaps as deemed necessary by the COP to meet the IA objectives.

These proposed Committees would work closely with other Subsidiary Bodies under the IA in exercising oversight of the implementation of the IA, including of decisions taken by the COP and other identified relevant bodies. In areas where such Regional Committees or other appropriate arrangements have not been established, the COP would continue to exercise its oversight responsibilities in the same way, without undermining relevant bodies and arrangements as per UNGA Resolution 69/292.

[39] In accordance with relevant provisions of UNCLOS and the UN Fish Stocks Agreement, as well as based on scientific information concerning biogeography.

[40] For the long term conservation and sustainability of the stocks.

[41] Certain regions might not have the need to have a specific regional committee in case relevant organisations are in place that (jointly) could play a similar role (cf. “collective arrangement” between competent international organisations in the NE Atlantic).

4. Proposed process for the establishment of MPAs in ABNJ

A suggested process for the establishment of MPAs under the Agreement could entail the following steps:

1. Adoption of a systematic approach to the development of an ecologically representative network of effectively managed MPAs (Viz. CCAMLR Conservation Measure 91-04). This could be elaborated during the negotiations of the IA and adopted as an integral component of the Agreement as another technical Annex; or this could be one of the first tasks to be addressed by SBSTA and decided by the COP.
2. Development by SBSTA and adoption by the COP of a global bioregional/biogeographic classification (that can be refined regionally) to be used as the basis for designating planning domains within which networks of interconnected representative MPAs can be proposed and developed. Alternatively, this could also be developed in parallel to the negotiations of the Agreement and adopted as another technical Annex to the Agreement, which could be revised over time on the basis of SBSTA advice in light of new scientific information.
3. States parties (individually or collectively), competent organisations, or observer organisations may submit an MPA proposal (including proposed priority elements of a management plan) to the COP. The proposal may (ideally) refer to a network of interconnected representative MPAs for a bioregion or biogeographic planning domain, or a single MPA. Priority should be given to development of such networks.
4. The COP requests advice from the Subsidiary Body on Scientific and Technical Advice, especially with respect to the MPA(s) location, delineation and design (in light of biological or ecological features, and in the context of establishing an ecological representative network), proposed conservation objectives and corresponding management measures (in light of existing or potential pressures/stressors on BBNJ in the area under consideration and biodiversity trends).
5. In parallel to the SBSTA assessment, an online consultation phase would be opened by the Secretariat, where stakeholders and relevant organisations (especially those with relevant data and information about the area and its marine biodiversity) are invited to comment upon the MPA proposal and to provide relevant additional information.
6. The consultation period would close well before SBSTA's deadline for advice, so that relevant scientific and technical input can be taken into consideration by SBSTA.
7. SBSTA would then provide advice to the COP on the MPA proposal, including its location, design, conservation objectives and on the priority elements of a management plan.
8. If accepted, the COP would designate the MPA and adopt the priority elements of the management plan. The new MPA(s) would be added to an annex to the Agreement, which would be binding upon all parties, and transmitted to competent organisations, states and any Regional Committees to finalise the management plan (within a specific timeframe) including adoption of respective conservation and management measures in accordance with their respective competencies and mandates. The COP decision establishing the MPA

would specifically set out reporting and review arrangements and which 'existing sectoral bodies' were expected to adopt and implement particular measures, with deadlines for both adoption and implementation of measures.

9. Parties and competent organisations would then report on their measures and other arrangements to effectively implement the MPA(s) to the COP in accordance with the reporting timeframes established. In the case of non-compliance, respective non-compliance procedures under the Agreement would be triggered and corresponding sanctions applied.

A process for the recognition under the IA of existing MPAs in ABNJ established by other organisations (e.g. by Regional Seas Organisations) should be included in the Agreement. Considering that best available scientific advice has been incorporated in these existing high seas MPA processes at regional levels (e.g. OSPAR, CCAMLR and Barcelona Convention), the COP could have the option to adopt them directly without reference to SBSTA, unless there is a need for further scientific input. The Secretariat would then facilitate consultation with the IA parties and stakeholders prior to the official adoption of any such MPAs by COP.

Other types of sectoral ABMTs (e.g. RFMO vulnerable marine ecosystem (VME) closures, IMO PSSAs, or ISA APEIs) would not require a formal global recognition process, but should be informed to the COP and included in the clearinghouse mechanism and information sharing mechanism. These should also be integrated in ecosystem-based integrated oceans management plans or marine spatial plans, and analysis of potential pressures, stressors or impacts on these areas should be fully integrated into SEAs and EIAs. Where appropriate, they could be introduced into the MPA process if deemed likely to contribute to establishing representative networks.

5. Proposed process for EIAs/SEAs under the IA

As described in WWF's paper on EIAs/SEAs for PrepCom2[42], SEAs at the (bio)regional level, where cumulative and cross-sectoral impacts are best considered, would provide a broad information framework within which individual EIAs could be conducted quicker, cheaper and easier.

Furthermore, SEAs could also contribute to identifying and preventing possible cross-jurisdictional transboundary impacts. As noted in the above-mentioned paper, all marine users should be subject to EIA procedures; however, the EIA requirements for different users could differ depending on the potential/likelihood of impacts by the respective activity. This flexibility would be codified in relevant guidelines. SEAs, by comparison, apply to a use(s), an activity, an area or a region. Once SEAs have been conducted, conducting individual EIAs becomes much simpler. SEAs should be collectively funded (e.g. funded from collective industry funds established under the IA) and describe the strategic context within which specific activities can take place, while EIAs are operator-funded/contributed exercises confined to a particular user and circumstance.

[42] Available at http://www.un.org/depts/los/biodiversity/prepcom_files/WWF_BBNJ_Prep_Com2_2016.pdf

In light of this, to determine the degree of detail contained in each EIA, WWF proposes a dual approach to an EIA screening process (by the SBSTA) under which all activities are to be assessed against a threshold-based approach that would be contained in an Annex to the Agreement**.** This would be based on the likelihood of significant adverse impacts (individually or combined) to occur on marine ecosystems, marine biodiversity and ecosystem services. The geographical area (and ecological relevance, considering presence of e.g. EBSAs, VMEs, PSSAs, IBAs, IMMA, ecological corridors) where the effects of the proposed activity are likely to occur should also play a role in determining the threshold. Individual and cumulative impacts on biodiversity and ecosystem services should be assessed (building upon any SEA that might have already been completed).

The recommendations of the Convention on Biological Diversity's Revised Voluntary Guidelines for the consideration of Biodiversity in Environmental Impact Assessments and Strategic Environmental Assessments in Marine and Coastal Areas (UNEP/CBD/COP/11/23) could be incorporated by reference, as well as other generally accepted minimum standards and EIA criteria. The criteria and guidance provided by the FAO International Guidelines on Deep-Sea Fisheries in the High Seas should also be incorporated, and the SBSTA could be tasked in developing further specific guidance to ensure coherence and to fill any gaps.

The SEA/EIA process suggested here includes the following steps:

1. SEA is prepared by the SEA/EIA Administrative Oversight Committee and/or Regional Committee in collaboration with SBSTA and the competent organisations identifying trends/scenarios in uses and activities in a given (bio)region. The SEA in this case would serve as a regional environmental assessment (REA) where cumulative effects of different activities and thresholds for individual activities effects as well as cross-sectoral conflicts could be identified. SEA information and outcomes would need to be subject to regular review.
2. Individual EIAs in the region under consideration would be guided by the outcome and information resulting from SEAs/REAs. Proponents of projects or activities likely to affect BBNJ in the region under consideration would have to submit an Environmental Impact Statement, based on guidelines provided by the respective SEAs/REAs, to relevant responsible states which need to have national capacities in place to assess the likelihood of significant adverse impacts on BBNJ. States parties would then be responsible for submitting a project proposal for a screening phase conducted by the relevant body in cooperation with SBSTA.
3. If concluded that an EIA is required, the commonly known steps of an EIA procedure would then need to be conducted, with the level of assessment proportionate to the likely scale of impacts based on application of relevant guidelines, namely:

   (i) Scoping by the relevant body (assisted by SBSTA, SEA/EIA Administrative Oversight Committee with the involvement of the Regional Committees and/or competent organisations as appropriate) with public participation (e.g. online consultations);

   (ii) Impact analysis;

(iii) Mitigation and impact management proposals;

(iv) EIA report submission to SBSTA, SEA/EIA Administrative Oversight Committee (with the involvement of the Regional Committees and/or competent organisations as appropriate) for review;

(v) Review with public participation (e.g. online consultation) and recommendation to COP;

(vi) COP decision approving or not approving the activity/project (and associated packages of conditions, including required measures);

(vii) Implementation, monitoring and reporting to the appropriate body and ultimately COP.

Further details on the specific steps concerning the EIA procedure and requirements will be submitted as part of WWF's rolling submission for PrepCom3.

6. Multilateral benefit-sharing from MGRs in ABNJ

Under existing multilateral benefit-sharing mechanisms, notably the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), monetary benefits arising from the use of genetic resources as a percentage of gross sales linked to patented products have not yet materialized. [43] Considering the need to accrue monetary benefits also with a view to distributing non-monetary benefits, existing multilateral benefit-sharing mechanisms have identified the need to ensure their financial viability by establishing an upfront regular payment of fees by users.[44] To that end, WWF suggests that the new IA establishes a system similar to the annual partnership contribution under WHO Pandemic Influenza Preparedness (PIP) Framework for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits. The WHO issues a questionnaire that identifies potential contributors, such as companies and institutions that conduct research and development in the field of influenza and all recipients of PIP biological material recorded in the Influenza Virus Traceability Mechanism database.[45]

Whereas all multilateral benefit-sharing mechanisms are expected to contribute to fairness and equity, this is usually left unspecified under relevant international arrangements.[46] One exception is the WHO PIP Framework, which provides a benchmark for equity based on the principles of public health risk and needs.[47] On this basis, the prioritization of countries is carried out by the WHO's regional officers. The WHO Director General oversees the distribution of benefits, with the support

[43] Elsa Tsioumani, "BENELEX Working Paper #9: Beyond Access and Benefit-sharing: Lessons from the Law and Governance of Agricultural Biodiversity" (SSRN, 2016): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2796658

[44] Elisa Morgera, "BENELEX blog post: Multilateral benefit-sharing: Whither from here?" (August 2016) at http://www.strath.ac.uk/research/strathclydecentreenvironmentallawgovernance/benelexproject/research/blog/morgerajune2016/

[45] http://www.who.int/influenza/pip/pc_questionnaire/en/.

[46] Elisa Morgera, Study on Experiences Gained with the Development and Implementation of the Nagoya Protocol and Other Multilateral Mechanisms and the Potential Relevance of Ongoing Work Undertaken by Other Processes, Including Case Studies (2016) UN Doc UNEP/CBD/ABS/A10/EM/2016/1/2.

[47] PIP Framework, article 6(1).

of an Advisory Group (comprising a mix of internationally recognised policy makers, public health experts and technical experts) that monitors implementation and may provide recommendations on the fair and equitable sharing of benefits.

To distribute benefits fairly and equitably, WWF suggests that the new IA could include, or combine: A project-based approach similar to the ITPGR Benefit-sharing Fund: following the announcement of a call for project proposals, these are received by the Secretariat and screened by a panel of experts according to specific eligibility and selection criteria which were adopted by the ITPGRFA Governing Body.[48] The new IA could assign priority to projects that support the conservation and sustainable use of biodiversity. To ensure that the competitive nature of the project-based approach takes sufficient account of the unequal capacities of countries and actors, promotes projects that serve collective interests beyond the specific area or actors involved in the project, and serves to strengthen coordination and cooperation between stakeholders, activities and countries to address global concerns, the IA could task the Secretariat with the organization of workshops and the provision of a helpdesk function to assist applicants to prepare proposals, similarly to what is being done under the ITPGRFA.[49]

In addition or as an alternative, the new IA could establish international criteria and guidelines for regional offices to identify and prioritize beneficiaries (states, but also indigenous peoples and local communities). The IA Secretariat could receive advice from, and the benefit-sharing system could be reviewed by, an international advisory group of experts. This could draw inspiration from the WHO PIP Framework.[50]

7. Capacity building and technology transfer

Capacity building measures and technology transfer should be designed to enable states now unable to do so to eventually become parties to and effectively participate in the implementation of the IA. The full participation of all states is necessary for ensuring that its provisions are effectively delivered upon. Institutional capacity building across sectors and organisations is also important to allow for a truly integrated implementation of the Agreement by all countries and competent bodies, to fulfil the ambition of biodiversity conservation and sustainable use.

Capacity building and the transfer of marine technology, in particular for least developed and land-locked developing countries, importantly also contributes to ensure intra-generational benefits that are part of the "leaving no one behind" commitment enshrined in the 2030 Agenda.

Information sharing, scientific cooperation, technology transfer and capacity building, including as forms of non-monetary benefit sharing, are generally left to voluntary and decentralized initiatives.

[48] http://www.fao.org/plant-treaty/areas-of-work/benefit-sharing-fund/overview/en/

[49] Elsa Tsioumani, "BENELEX Working Paper #9: Beyond Access and Benefit-sharing: Lessons from the Law and Governance of Agricultural Biodiversity" (SSRN, 2016): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2796658 and BENELEX blogpost http://tinyurl.com/zs2up4g]

[50] http://www.who.int/influenza/pip/advisory_group/en/

A trend may be emerging, however, towards more institutionalized approaches to facilitate and broker information sharing, scientific cooperation, technology transfer and capacity building at the international level. The ISA, for instance, has developed guidelines on training programmes for operators that will act as a benchmark for assessing their exploration proposals, with the ISA Secretariat assisting in matching suitable candidates to opportunities in consultation with contractors. The ISA Legal and Technical Commission then agrees on a list of pre-approved candidates from the roster on the basis of transparent criteria and conduct regular reviews to ensure that the goal of equitable and geographic sharing of opportunities is followed.

In line with an increasing trend towards institutionalized approaches to ensure effective and equitable implementation of international obligations on technology transfer and capacity building,[51] WWF suggests that the new IA establishes a clearinghouse that, similarly to the approach envisioned for the ITPGRFA Global Information System (GLIS[52]) has the mandate to:

- provide a web-based entry point to information and knowledge that is specifically geared towards strengthening the capacity for the conservation and sustainable utilization of BBNJ;
- promote and facilitate interoperability among existing information systems (through the development of principles and technical standards);
- create a mechanism to assess progress and monitor effectiveness in information sharing through online databases (feedback and periodic consultations);
- enhance opportunities for collaboration (including focus on high-priority material); and
- provide capacity development and technology transfer.[53]

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[51] Elisa Morgera, Study on Experiences Gained with the Development and Implementation of the Nagoya Protocol and Other Multilateral Mechanisms and the Potential Relevance of Ongoing Work Undertaken by Other Processes, Including Case Studies (2016) UN Doc UNEP/CBD/ABS/A10/EM/2016/1/2.
[52] ITPGR Art. 17
[53] ITPGR resolution 3/2015.